

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

October 23, 2000

IN RE:

COMPLAINT OF AVR OF TENNESSEE, LP d/b/a
HYPERION OF TENNESSEE, LP AGAINST
BELLSOUTH TELECOMMUNICATIONS, INC.
TO ENFORCE RECIPROCAL COMPENSATION
AND "MOST FAVORED NATION" PROVISIONS OF
THE PARTIES' INTERCONNECTION AGREEMENT

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DOCKET NO.
98-00530

ORDER DENYING BELLSOUTH'S PETITION FOR STAY AND REQUIRING
COMPLIANCE WITH AUTHORITY'S SEPTEMBER 22, 2000 ORDER

This matter came before the Directors of the Tennessee Regulatory Authority (the "Authority") at a specially noticed public hearing held on October 17, 2000 for the purpose of addressing the *Petition for Stay* filed by BellSouth Telecommunications, Inc. ("BellSouth"). In its *Petition for Stay*, BellSouth requests the Authority to stay its September 22, 2000 *Order Denying BellSouth's Petition for Appeal and Affirming the Initial Order of the Hearing Officer on the Merits* ("Final Order"), pending resolution of an appeal BellSouth intends to file.¹ After reviewing the Final Order, BellSouth's *Petition for Stay*, the Response thereto and the record in this matter, the Directors voted unanimously to deny BellSouth's *Petition for Stay*.

Background

This docket was initiated by a Complaint filed by AVR of Tennessee, L.P., d/b/a Hyperion of Tennessee, L.P. ("Hyperion") against BellSouth for the enforcement of reciprocal

¹ In its Petition, BellSouth states that it did not obtain a copy of the September 22, 2000 Order until September 29, 2000, hence the reason for the delay in filing the *Petition for Stay*.

compensation and “most favored nation” provisions of the Interconnection Agreement between Hyperion and BellSouth. The Hearing on Hyperion’s Complaint was held on September 17, 1999 before Chairman Melvin J. Malone, presiding as the Hearing Officer. Thereafter, the parties submitted post-hearing briefs on October 29, 1999.

The *Initial Order of the Hearing Officer on the Merits* (“*Initial Order*”), issued on April 14, 2000, contained the following findings: (1) Internet Service Provider (“ISP”) bound traffic shall be treated as local traffic under the Agreement; (2) it is appropriate to include ISP-bound traffic for the purpose of determining whether the 3,000,000 minute threshold under Section IV.C of the Agreement has been exceeded and whether Hyperion has met this threshold; and (3) Section IV.C does not preclude Hyperion from amending the Agreement pursuant to the provisions of Section XIX. On May 1, 2000, BellSouth filed a *Petition for Appeal* requesting the Authority to review the Hearing Officer’s *Initial Order*. Hyperion responded to BellSouth’s Petition on May 10, 2000. BellSouth filed a Reply Memorandum in Support of its Petition on May 15, 2000.

The Authority considered BellSouth’s *Petition for Appeal* at a regularly scheduled Authority Conference on May 23, 2000. Upon reviewing the record in this matter, including BellSouth’s Post-Hearing Brief filed on October 29, 1999, the Hearing Officer’s *Initial Order*, and BellSouth’s *Petition for Appeal*, the Authority found (1) that the *Initial Order* correctly found and fully explained that BellSouth and Hyperion mutually agreed to pay reciprocal compensation for ISP-bound traffic when the Agreement was negotiated and (2) that the *Initial Order* correctly reached the conclusion that Hyperion is entitled to amend the Interconnection Agreement under either Section IV.C or Section XIX. The Authority found further that the findings and conclusions of the Hearing Officer were fully explained in the *Initial Order*, thereby

removing the objections of BellSouth as set forth in its *Petition for Appeal*. Based upon its examination of the record, the Authority unanimously denied BellSouth's *Petition for Appeal* and affirmed the *Initial Order of the Hearing Officer on the Merits*.

BellSouth's Petition for Stay

The Authority's *Order Denying BellSouth's Petition for Appeal and Affirming the Initial Order of Hearing Officer* was issued on September 22, 2000. BellSouth filed its *Petition for Stay* (the "*Petition*") on October 6, 2000, together with a copy of its October 29, 1999 Post-Hearing Brief and an Affidavit of Guy Hicks explaining the delay in filing the *Petition*. On October 9, 2000, the Authority issued a Notice of Filing and Hearing requesting Hyperion to file a response by October 12, 2000 and setting BellSouth's *Petition* for consideration by the Authority on October 17, 2000. Hyperion filed its Response to the *Petition* on October 12, 2000.

In its *Petition*, BellSouth argues that it should be granted a stay because it is likely to succeed on the merits of its appeal of the Authority's decision requiring BellSouth to pay to Hyperion reciprocal compensation for ISP bound traffic. BellSouth relies entirely upon its Post-Hearing Brief, filed on October 29, 1999, in support of its *Petition*. In its Response, Hyperion maintains that BellSouth's *Petition* should be denied for the same reasons that the Authority initially rejected BellSouth's position as set forth in its Post-Hearing Brief and its *Petition for Appeal*. Additionally, Hyperion asserts that the *Petition* should be denied for the same reasons that the Authority denied BellSouth's *Petition for Reconsideration and Stay* in the Authority Docket No. 98-0018, *In Re: Petition of Brooks Fiber to Enforce Interconnection Agreement and For Emergency Relief* (Authority's March 3, 1999 Order).

BellSouth filed its *Petition for Stay* pursuant to Tenn. Code Ann. § 4-5-316 which does not set forth the criteria to be considered for determining whether a stay should be granted.

Nevertheless, Authority Rule 1220-1-2-.19 which became effective on September 13, 2000, specifically addresses a petition for stay filed before the Authority and provides as follows:

- (3) In deciding whether to grant a stay, the Authority shall consider and give appropriate weight to:
- (a) the likelihood of the success of the petitioner on appeal;
 - (b) the hardship or injury which may be imposed on the petitioner if a stay is not granted;
 - (c) the hardship or injury which may be imposed on others if a stay is granted; and
 - (d) the public interest.

Likelihood of success of Petitioner on appeal

In attempting to demonstrate the likelihood of success on the merits of the appeal, the moving party must demonstrate that there exists a likelihood of reversal of the order being appealed. In support of its position, BellSouth offers nothing beyond the argument it presented to the Hearing Officer before he rendered his decision on the merits. Other than essentially telling the Authority that it made a mistake in affirming the Hearing Officer's *Initial Order*, BellSouth does not provide any ground or reason to support its assertion that it would prevail on the merits of this case in its appeal before the U.S. District Court or the Tennessee Court of Appeals. In its Response, Hyperion points out that BellSouth similarly argued the likelihood of success in support of its request for a stay of the Authority's order in the *Brooks Fiber* case and the U.S. District Court rejected that argument and denied the request for a stay.²

Hardship or injury imposed on Petitioner if stay is not granted

BellSouth's only attempt to show hardship or injury is its plea that it "should not be required to incur the administrative expense and risk associated with payment of reciprocal compensation for Internet traffic to [Hyperion]...only to, perhaps, later be in the position of

² See, Court's Memorandum, September 30, 1999, at 5-6, in *BellSouth Telecommunications, Inc. v. Brooks Fiber Communications of Tennessee, Inc., The Tennessee Regulatory Authority, Melvin J. Malone, H. Lynn Greer and Sara Kyle*. CC No. 3-98-0811. (Attached to Hyperion's Response, October 12, 2000.)

seeking return of the money after a successful appeal.”³ Again, relying on the Court’s decision in the *Brooks Fiber* case, Hyperion demonstrates that the U.S. District Court addressed a similar argument and ruled that BellSouth would not suffer irreparable injury if required to pay reciprocal compensation as ordered by the Authority.⁴

Hardship or injury imposed on others if the stay is granted

BellSouth argues that there is no hardship to Hyperion in waiting for a determination before requiring a payment because “Hyperion, as BellSouth, is an established corporation with substantial presence in Tennessee.”⁵ To the contrary, in addressing a similar argument as related to Brooks Fiber, the U. S. District Court found that Brooks Fiber would suffer substantial harm if the stay were granted in that Brooks Fiber would not be able to collect the money owed it by BellSouth.⁶

Public Interest Concerns

BellSouth did not address the public interest factor in seeking a stay. Nonetheless, Hyperion demonstrates that the U. S. District Court found in *Brooks Fiber* that the public interest in promoting competition in the telecommunications market would be served by enforcing the Authority’s decision. Specifically, the Judge Echols stated:

Finally, the Court finds the public interest is served by requiring parties to live up to their legal and contractual obligations, as determined by state agencies and other government entities. In this case, granting the requested stay would allow BellSouth to avoid these obligations, while hindering Brooks Fiber’s ability to compete in the telecommunications market by denying compensation on which it had relied and to which it is presently entitled under the Order.⁷

³ BellSouth’s *Petition for Stay*, October 6, 2000, at 1.

⁴ Court’s Memorandum, September 30, 1999, at 6, in *BellSouth Telecommunications, Inc. v. Brooks Fiber Communications of Tennessee, Inc., et al.*, CC No. 3-98-0811.

⁵ BellSouth’s *Petition for Stay*, October 6, 2000, at 2.

⁶ Court’s Memorandum, September 30, 1999, at 6, in *BellSouth Telecommunications, Inc. v. Brooks Fiber Communications of Tennessee, Inc., et al.*, CC No. 3-98-0811.

⁷ Court’s Memorandum, September 30, 1999, at 6-7, in *BellSouth Telecommunications, Inc. v. Brooks Fiber Communications of Tennessee, Inc., et al.*, CC No. 3-98-0811.

Findings and Conclusions

BellSouth has not made the requisite showing under Tenn. Code Ann. § 4-5-316 or Authority Rule 1220-1-2-.19 to require the Authority to grant its *Petition for Stay*. Indeed, BellSouth has exhibited little more than a token effort in filing a two-page Petition supported by a dated post-hearing brief. In reviewing BellSouth's *Petition for Stay*, the Authority finds that BellSouth offers no new argument in support of its position but instead relies exclusively upon its October 29, 1999 Post-Hearing Brief. BellSouth's arguments in that brief have been expressly rejected by the Hearing Officer in his *Initial Order* and by the Directors of the Authority in affirming the Hearing Officer's *Initial Order* and denying BellSouth's Petition for Appeal. Further, Hyperion points out in its Response and through the filings from the *Brooks Fiber* case, BellSouth did not prevail before the Authority or the U. S. District Court in making similar arguments in support of its petition for stay of the Authority's Order in the *Brooks Fiber* case. Based upon the foregoing, the Directors voted unanimously to deny BellSouth's *Petition for Stay*.

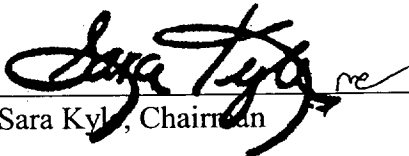
Hyperion's Request for Payment from BellSouth by a Date Certain

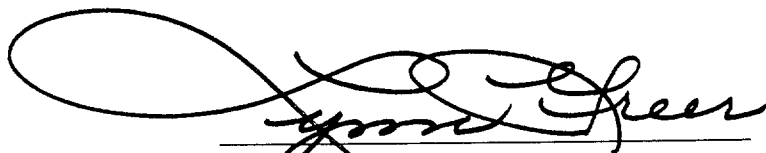
In its Response, Hyperion asks not only that the Authority deny BellSouth's *Petition for Stay* but also seeks relief from the Authority by requiring BellSouth to make payments of reciprocal compensation pursuant to the Authority's September 22, 2000 Order by a date certain. Hyperion argues that BellSouth has been ordered by the Authority to comply with the reciprocal compensation arrangement in the Interconnection Agreement consistent with the Hearing Officer's *Initial Order* and the Authority's September 22, 2000 Order. Based upon a review of the record in this case, and having denied BellSouth's *Petition for Stay*, the Authority finds that BellSouth must comply with the Interconnection Agreement between BellSouth and Hyperion

and must commence making payments to Hyperion no later than thirty (30) days from the date of entry of this Order.

IT IS THEREFORE ORDERED THAT:


1. BellSouth Telecommunications, Inc.'s *Petition for Stay* is denied;
2. BellSouth shall comply with the reciprocal compensation arrangement set forth in the Interconnection Agreement, as amended, consistent with the *Initial Order of the Hearing Officer on the Merits* and the Authority's September 22, 2000 Order;
3. Any party aggrieved by the decision of the Authority has the right to judicial review by filing a Petition for Review in the United States District Court as provided for in 47 U.S.C. § 252(e)(6).


Sara Kyle, Chairman


H. Lynn Greer, Jr., Director


Melvin J. Malone, Director

ATTEST:


K. David Waddell, Executive Secretary